SUPREME COURT, U. S.
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JOHN F. DAVIS, CLE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 1095

In the Matter of the Application of THE CITY OF NEW YORK relative to acquiring title to certain real property designated as Lot 10 in Block 439, etc. (5 parcels, Manhattan)—FIFTH AVENUE COACH LINES, INC., and four other proceedings.

FIFTH AVENUE COACH LINES, INC.,
SURFACE TRANSIT INC.,

Appellants,

—v.—

THE CITY OF NEW YORK,

Respondent.

ON APPEAL FROM THE NEW YORK COURT OF APPEALS

APPELLANTS' BRIEF IN OPPOSITION TO MOTION TO DISMISS

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Respondent's Motion to Dismiss includes many factual assertions which are totally irrelevant to the simple issue presented by this appeal (Motion to Dismiss, pp. 3, 4 and 10). We will not attempt to refute such assertions but will confine this reply to the legal issues raised.

Respondent's Motion to Dismiss is based on the following arguments:

(1) The appeal does not present a substantial federal question because "this Court has previously sustained the statute under attack" (Motion to Dismiss, pp. 2, 5).

(2) The question sought to be reviewed was not properly raised or expressly passed on in the lower courts because: (a) appellants "chose to introduce no evidence" that interest at 4% per annum was not adequate to compensate them for delay in payment of the award (Motion to Dismiss, pp. 4, 7-9); and (b) appellants did not "expressly invoke" the due process clause of the Fourteenth Amendment of the Federal Constitution when they contended in the lower courts that New York General Municipal Law (McKinney 1965) §3-a was unconstitutional (Motion to Dismiss, pp. 2, 10-11).

(3) The judgment rests on an adequate nonfederal basis because it rests solely on a "finding of fact as to the adequacy of compensation for delay in payment" (Motion to Dismiss, pp. 9, 2, 6-10).

We consider these contentions in order.

(1)

The Issue Now Raised Has Never Been Passed Upon By This Court.

Respondent contends that the appeal herein "raises no substantial federal question" because this Court has previously upheld the constitutionality of New York General Municipal Law (McKinney 1965) §3-a (Motion to Dismiss, pp. 2, 5). The sole case cited is *Matter of City of N. Y. (Bronx River Parkway)*, 284 N. Y. 48 (1940), *aff'd sub nom., A. F. & G. Realty Corp.* v. *City of New York*, 313 U. S. 540 (1941).

That case is inapposite because although this Court considered New York General Municipal Law (McKinney

1965) §3-a in the *Bronx River Parkway* case, it did not consider the only issue raised herein. The mere fact that a statute is once upheld by this Court on one ground does not forever immunize it from constitutional attack on other grounds. An appeal is precluded only where "the question on the merits is not open to possible contention because it has previously been so specifically and adversely ruled on by this Court as to absolutely foreclose further contention on the subject." *Equitable Life Assurance Society of the United States* v. *Brown*, 187 U. S. 308, 311 (1902); STERN & GRESSMAN, SUPREME COURT PRACTICE §3-25, p. 91 (3d ed. 1962).

Appellants' contention here is that §3-a as applied in this case violated the due process clause of the Fourteenth Amendment because it precluded appellants from recovering more than the 4% statutory interest rate even though it was undisputed that that rate would not adequately compensate them for the delay in payment of the condemnation award.

The contentions in *Bronx River Parkway* were entirely different. They were: first, that the condemnees' property had been seized prior to the enactment of §3-a and therefore that section could not be retroactively applied to limit compensation for delay in payment to 4% of the award;* second, that since the interest rate payable to

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* Thus, each of the first four questions presented in the *Bronx River Parkway* case referred to the fact that §3-a had been enacted after seizure of the condemnees' property. The questions in *Bronx River Parkway* were (Appellants' Statement as to Jurisdiction, pp. 17-18):

(1) May a state by legislative enactment provide that the part of an owner's right to just compensation represented by the interest on the award from the date of vesting of title to the date of payment, shall be fixed at a rate less than the rate in effect when title vested in the condemning authority?

(2) Does not an owner whose property has already been taken from him by the state but who has not as yet been paid have the

the condemnees was less than what it would have been if some party other than a municipality had been the condemnor, the statute violated the equal protection clause.*

In the instant case, appellants' property was seized well after the enactment of §3-a and appellants have not raised any question under the equal protection clause of the Fourteenth Amendment. Accordingly, there is no basis for respondent's contention that the *Bronx River Parkway* case precludes this Court from considering the issue now raised by appellants.

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right to just compensation determined factually as of the date of taking and in accordance with the state statutes in effect when title vested therein?

(3) Does not the owner in a state condemnation proceeding, wherein on the date of vesting of title the statutes provided that interest at the legal rate (then six *per centum* per annum) should be added to the award from the date of vesting of title as part of his just compensation?

(4) In view of the United States Supreme Court's decisions holding that the right to just compensation, including interest, is an implied contract in fact, does not the assailed statute impair the contract existing as of the date of vesting of title?

* The fifth and last question certified in *Bronx River Parkway* related to an alleged violation of the equal protection clause of the Fourteenth Amendment. It was (Appellants' Statement as to Jurisdiction, p. 18):

(5) Can the state decree that in takings wherein it or its municipalities are the condemnors, the proper or fair rate of interest in a just compensation proceeding shall be less than what it would be if some other parties were the condemnors? Can the fair or proper measure of compensation for the same property fluctuate with the identity of the condemnor?

(2)

The Question Sought to Be Reviewed Was Properly Raised and Expressly Passed On.

(A) Appellants' Offer of Proof in the Trial Court Properly Raised the Constitutional Issue.

Respondent contends that because appellants proceeded in the trial court by the route of an offer of proof rather than by actually adducing evidence, they are somehow barred from raising the constitutional issue in this Court (Motion to Dismiss, pp. 4, 7-9). But respondent nowhere contends and has never contended, that this manner of raising the issue in the state courts was improper as a matter of state procedure. Under the circumstances, the fact that appellants proceeded by an offer of proof does not prevent this Court from considering the issue thereby raised. The manner of raising the constitutional issue in the state courts can only preclude an appellant from raising the issue in this Court where the issue was not raised below in accordance with state procedure. STERN & GRESSMAN, *op cit. supra* §3-25, *et seq.*, HART & WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM p. 500 (1953).

The trial court herein held that appellants could proceed by an offer of proof (13552-3). Respondent did not contend that such method was improper as a matter of state procedure. On the contrary it accepted this procedure (13552), and admitted as much in its briefs to the Appellate Division and the Court of Appeals, stating: "Both the City and the Trial Court accepted this method of presenting the issue." (Respondent's Main Brief to the Appellate Division, p. 268; Respondent's Main Brief to the Court of Appeals, p. 196).

The context in which the offer of proof was made makes clear why no objection was raised. The Appellate Division, in affirming a decision of the very trial judge before whom the offer of proof was made herein, had stated with respect to a similar offer of proof in *Matter of City of New York (Maxwell)*, 15 App. Div. 2d 153, 178, 181 (1st Dep't 1961), *aff'd sub nom., Matter of City of New York (Schnurmacher Corp.)*, 16 N. Y. 2d 497, 828 (1955):

> "[T]hese statements and others of like purport, if proven, would not overcome the presumptive applicability of section 3-a."

Under these circumstances, claimants proposed, and respondent and the Trial Court agreed, that in order to save time claimants proceed by offer of proof and that only in the event of a reversal on this issue, would evidence be adduced (13552-3).*

(B) Appellants Raised the Constitutional Issue With Sufficient Specificity in the Trial Court.

Respondent also urges that this issue was not properly raised because in the Trial Court, appellants did not "expressly invoke" the due process clause of the Fourteenth Amendment in contending that New York General Munic-

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* Respondent also points to the fact that, in the remanded proceedings ordered by the Court of Appeals, appellants failed to make "even an offer to prove that the statutory rate afforded inadequate compensation for delay in payment" (Motion to Dismiss, p. 7). No such offer was necessary. It had been made at the first trial when it should have been made and, in any event, the only purpose of the remand was to determine "the value of the going concern assets as an addition to the amount heretofore awarded." *Matter of City of New York (Fifth Avenue Coach Lines, Inc.)*, 18 N. Y. 2d 212, 224 (1966). Obviously, an offer of proof in the remanded proceedings could not affect compensation for the delay in payment of the award for the tangible property, the only issue before this Court.

ipal Law (McKinney 1965) §3-a was unconstitutional as applied (Motion to Dismiss, pp. 2, 10-11).

But this Court has never held that the particular clause of the Federal Constitution must be "expressly invoked" in order properly to raise the constitutional issue in the state courts, where the record shows that the state court was directed to the constitutional question. The applicable rule was stated in *Bryant* v. *Zimmerman*, 278 U. S. 63, 67 (1919):

> "There are various ways in which the validity of a state statute may be drawn in question on the ground that it is repugnant to the Constitution of the United States. No particular form of words or phrases is essential, but only that the claim of invalidity and the ground therefor be brought to the attention of the state court with fair precision and in due time. And if the record as a whole shows either expressly or by clear intendment that this was done, the claim is to be regarded as having been adequately presented."

The record herein clearly demonstrates that the federal question was "brought to the attention of the state court with fair precision and in due time."

Appellants' counsel contended in the Trial Court that interest at 4% in this case would be "inadequate compensation as a matter of law and as a matter of fair constitutional rights" (13550), and specifically referred to two opinions in the *Lincoln Square* case where the precise issue now before this Court was discussed. (See 13550-51 referring to *Matter of City of New York (Lincoln Square Slum Clearance Project)*, 22 Misc. 2d 609 (Sup. Ct. N. Y. County 1959) and *Matter of the City of New York (Maxwell)*, 15 App. Div. 2d 153, 178-182 (1st Dep't 1961).) The

court in the *Lincoln Square* case had described the contention of claimants as follows (22 Misc. 2d at 610):

> "Claimants urge that I should disregard this statute upon the ground that, during the period from February 28, 1958 (title vesting date) to the entry of the final decree, the 4% rate is factually insufficient to meet the constitutional guarantee of just compensation required by the due process clause of the Fourteenth Amendment of the Federal Constitution, and by section 7 of article I of the New York State Constitution."

Except for the vesting date, this statement could have equally well described appellants' federal constitutional contention herein.

And that court had rejected the contention in the following language (22 Misc. 2d at 611):

> "There is no constitutional requirement that just compensation for delay in making payment must be exactly equal to 'the fair rate of interest for the use of money in the open money market in New York City where money is borrowed without collateral and where the lender does not receive income tax benefit,' the test urged by claimants. It is probably true that such rate is higher today, and has been since February, 1958, than it was in 1939, when this statute was first enacted. Yet in 1956 the Legislature, knowing that the legal rate of interest was 6%, reiterated its mandate that the city should pay only 4% on a condemnation award."

The judge who wrote both of the above-quoted excerpts in the *Lincoln Square* case was the very judge before whom the instant proceeding was tried. This record clearly shows that he understood that he was deciding a federal

constitutional question under the due process clause of the Fourteenth Amendment for he stated in rejecting appellants' contention herein (13582):

> "The reasons for this determination are set forth in the decision on similar claims I made in Matter of the City of New York (Lincoln Square Slum Clearance Project), 22 Misc. 2d 609, and those stated by Presiding Justice Botein in his affirmance opinion in 15 A. D. 2nd, 153."

Thereafter, as we have shown in our Jurisdictional Statement (p. 8), the issue was specifically raised and argued by appellants herein in the Appellate Division and the Court of Appeals. Surely, appellants were not required to do more to preserve the issue for consideration by this Court.

(3)

The Courts Below Necessarily Determined the Federal Question of the Constitutionality of Section 3-a As Applied Herein.

Respondent contends that the judgment appealed from is based solely upon an adequate nonfederal ground, "a finding of fact" that "appellants' 'proof' was insufficient to overcome the presumptive applicability of the statute" (Motion to Dismiss, pp. 5, 10). This statement is entirely erroneous. There was no "finding of fact" on the issue because there was never a factual issue relating to interest in this case.* It is undisputed on this record

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* To fully reveal the absurdity of the contention that the lower courts' holdings were merely "factual findings", we need only recall one of the reasons why both the Trial Court and the Appellate Division in the *Lincoln Square* case held that the statutory rate of 4% was fair compensation for use of the condemnee's funds. These courts stated that the City

that appellants have been forced to accept 4% simple interest *per annum* during a four and one-half year period when (a) they could have earned considerably more than 4% in the then prevailing money market (13559-60) and (b) they were required to borrow money at rates considerably higher than 4% (13551-9).

Moreover, even if it could fairly be stated that there was a "finding of fact" as to the adequacy of 4% simple interest *per annum* to compensate appellants for the delay in payment of their award, this Court would not be deprived of jurisdiction. For appellants submit that any state law which would permit such a "finding of fact" on this record is unconstitutional and that regardless of nomenclature—whether the holdings of the lower courts are called "findings of fact", "findings of law" or "mixed findings of fact and law"—the effect of these holdings was to deny appellants compensation exceeding 4% simple interest *per annum*, even though the undisputed facts showed that 4% was inadequate.

Respondent also contends that the "reason" why appellants did not request clarification of the remittitur of the Court of Appeals herein was that the Court of Appeals' affirmance "was wholly predicated upon adequate non-federal grounds" (Motion to Dismiss, p. 10). In fact, no such clarification was necessary in this case. In the *Lincoln Square* case, it will be recalled, the condemnees raised the

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of New York, the condemnor herein, had been "classified" by the New York Legislature as a "favored debtor". See *Matter of City of New York (Lincoln Square Slum Clearance Project)*, 22 Misc. 2d 609, 611-12 (Sup. Ct. N. Y. County, 1959), *aff'd, Matter of City of New York (Maxwell)*, 15 App. Div. 2d 153, 178, 182 (1st Dep't 1961). Such a "classification" necessarily amounts to a conclusive presumption that 4% is fair compensation because no proof showing the *condemnees'* losses resulting from inadequate interest could overcome (or would even be relevant to) the "classification" of the *condemnor* as a "favored debtor" and the consequent "finding" that 4% is fair compensation.

identical issue raised by appellants herein (p. 8, *supra*) and also did so by an offer of proof (p. 6, *supra*).

In *Lincoln Square,* the condemnees moved the Court of Appeals to clarify its remittitur to show that a federal question had been presented and passed upon. The Court of Appeals granted the motion stating, *Matter of City of New York (Schnurmacher Corp.),* 16 N. Y. 2d at 828:

> "Upon the appeal herein there were presented and necessarily passed upon questions under the Constitution of the United States, viz.: Movants-appellants contended that the application of section 3-a of the General Municipal Law to a judgment or accrued claim arising out of a condemnation proceeding deprived them of their right to just compensation and contended that they received less than just compensation with regard to damage parcels 27 and 412, all in violation of their rights under the Fifth and Fourteenth Amendments of the Constitution of the United States. The Court of Appeals held that appellants' constitutional rights had not been violated. [See 16 N. Y. 2d 497.]"

In view of the identity of the issues raised and procedure followed in this case and *Lincoln Square,* and the fact that the constitutional question was raised and argued in all three state courts, no clarification of the remittitur herein was necessary to show that a federal question had been properly presented and was passed upon.

CONCLUSION

The Motion to Dismiss should be denied and this Court should either reverse the decision below or else note probable jurisdiction of the appeal.

Respectfully submitted,

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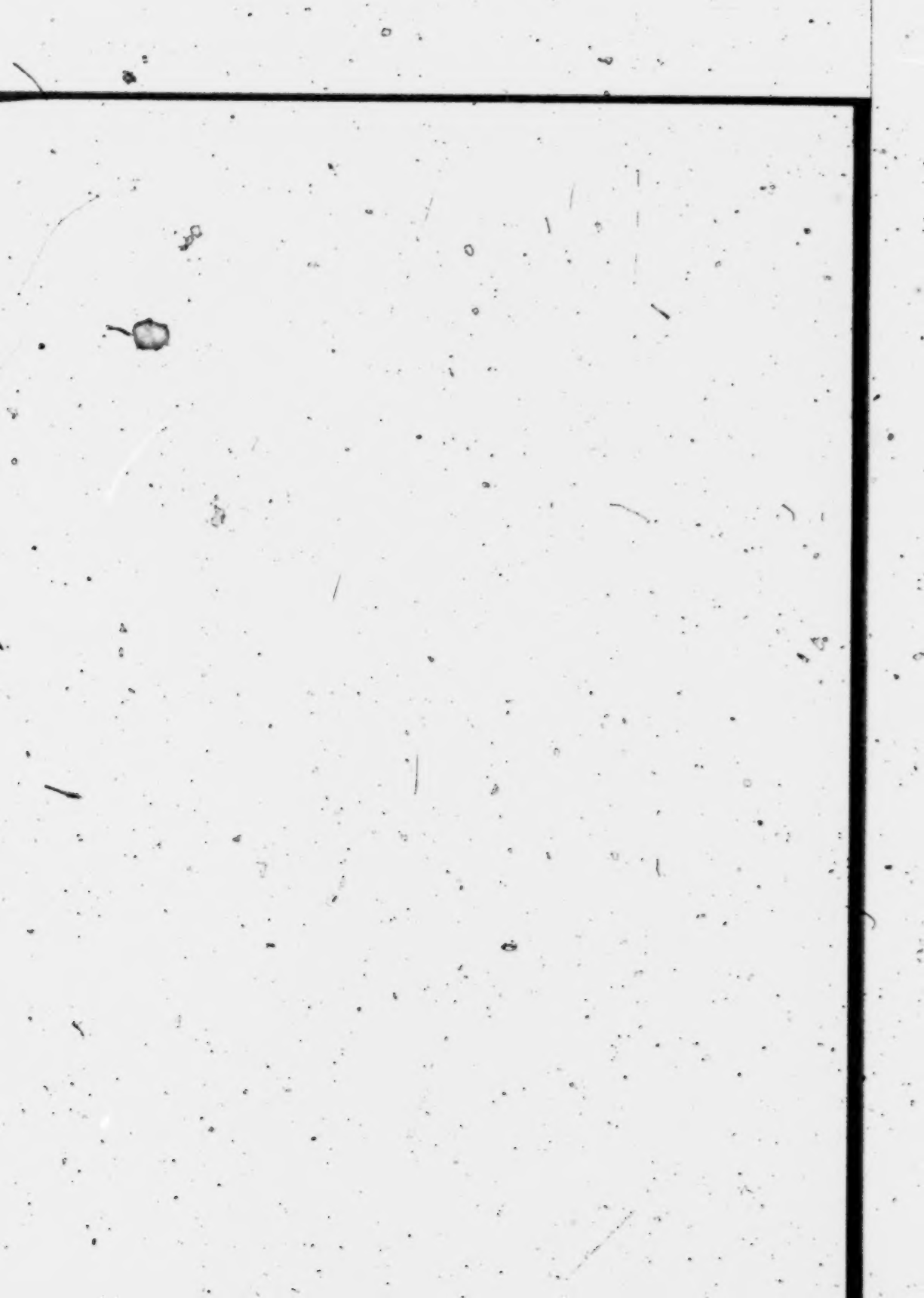

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966.

FIFTH AVENUE COACH LINES, INC., ET AL. *v.* CITY OF NEW YORK.

APPEAL FROM THE COURT OF APPEALS OF NEW YORK.

No. 1095. Decided May 8, 1967.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question.